Filed 8/26/19 P. v. Sanchez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ZACK SANCHEZ, Defendant and Appellant.	F074386 (Kern Super. Ct. No. BF161033A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Jerome P. Wallingford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Stephanie A. Mitchell, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

SEE CONCURRING AND DISSENTING OPINION

INTRODUCTION

Around 4:25 a.m. on August 2, 2015, Leyda Zavaleta (Leyda)[1] was shot in the neck while she was at a party that she had hosted in the front yard of her house. Leyda was seriously injured but survived the wound. When the police arrived at the scene, Leyda's sister identified defendant Zack Sanchez by name as the gunman. Other party guests confirmed defendant's identity through a photographic lineup.

At trial, Leyda and her family testified that defendant had been at the party all night; he was carrying a gun in his waistband; he flashed his gun to other guests and fired a shot in the air earlier in the evening; and he shot Leyda in the neck when she told him that he had to leave.

Defendant's mother and her friend testified as prosecution witnesses that defendant suddenly arrived at the mother's apartment around 4:40 a.m. and asked them to say he had been there all night. Defendant was arrested as he left his mother's apartment. Shortly after his arrest, defendant told the police that he had been riding bicycles with friends and was never at the party. Shortly before the trial, the defense advised the prosecution that two witnesses would provide an alibi for defendant. At trial, a woman testified defendant was with her all night; they met another woman at the club where she was working; and they were never at Leyda's party.

Defendant was charged and convicted of premeditated attempted murder of Leyda and other offenses and sentenced to life with the possibility of parole after seven years.

Defendant raises two evidentiary issues on appeal. First, he contends the court abused its discretion when it granted the People's motion to introduce a very short video that the victim had taken on the night of the party. Leyda testified that the video showed defendant was there. Defendant argues the prosecutor did not timely disclosure the

[1] The prosecution witnesses included four members from the same family. We will refer to them by their first names, and by abbreviations for the minor children, for ease of reference; no disrespect is intended.

existence of the video to the defense, and discovery violation was prejudicial because defense counsel learned about the video after she gave her opening statement. We will find that any error from the court's discovery and evidentiary rulings was not prejudicial under any standard of review.

Defendant's second issue is that the court abused its discretion when it granted the People's motion to introduce evidence about Facebook messages on defendant's cell phone that he exchanged with a third party who was not at the party or involved in the shooting. The messages were sent the day before Leyda's party, and defendant said he wanted to kill people. As we will explain, the court did not abuse its discretion when it admitted the Facebook messages because the evidence was relevant to intent.

We will affirm.

FACTS

Maria Zavaleta (Maria) lived in Bakersfield with her four children: 20-year-old Leyda, 16-year-old Pa., 12-year-old P., and an older daughter. Leyda's three-year-old son also lived in the house.

On the night of August 1, 2015, Leyda and Pa. invited friends to hang out at a "kickback" party at their home. Maria and P. attended the party.

Maria testified the party started around 9:00 p.m. and went on for several hours. The party was in the front yard and everyone stayed outside. There were 15 to 16 people there. There was tequila, beer, and vodka at the party, and everyone was drinking.[2]

Maria testified that she had 10 to 11 beers from the beginning of the party, up to the time that Leyda was shot at 4:25 a.m. Maria testified she was not drunk, and she paid attention to what was going on because she was responsible for everyone.

[2] Toward the end of the trial, the jury was transported to Leyda's house to view the scene in the front yard.

Leyda testified she drank tequila and beer. She could not remember how much she drank, but testified she was fully conscious and remembered everything that happened. Pa. and P. were not drinking.

The Guests

Maria testified defendant, Sergio Mendez (Mendez), and Trevon Miles (Miles) were the first to arrive. Maria did not personally know defendant, but heard Mendez and Miles call him by his full name. Maria spoke to defendant three or four times that night. Defendant did not appear intoxicated.

Pa. testified she invited Miles because he was her friend, and Miles brought defendant and Mendez. Pa. did not personally know defendant, but knew he was a friend of Miles. Pa. knew defendant's name through Facebook and recognized him when he arrived at the party. Pa. testified that when defendant initially arrived at the party, he was friendly and looked "pretty excited."

Leyda had never met defendant but knew him through Facebook and also knew that he was her sister's "ex-best friend's cousin."

Leyda testified defendant was in his early 20s with a fade haircut and no facial hair; he was wearing a white T-shirt and jeans. Maria and P. testified that defendant was wearing a white T-shirt and blue jeans, not shorts.[3]

Defendant Shows the Gun to Pa.'s Friends

Maria testified that defendant was hanging out at the party when three men arrived who were Pa.'s friends. The men entered the front yard and joined the other guests. Maria saw defendant walk up to the men, pull up his shirt, point to his pants, and show them that he had a gun. Maria could see the handle of the gun over defendant's front waistband. Maria testified defendant's "walking didn't give me a good vibe." She felt he

[3] Gloria Sanchez, defendant's mother, testified he was 22 years old.

was acting territorial and as though he was "showing authority" when he approached the three men.

Maria thought defendant said something to the three men, but she could not hear anything. She testified that after defendant showed the gun, one of the men walked out of the front yard.

Maria testified that after this incident, she told Leyda she did not want any weapons at the house, and she wanted defendant "to leave or take his toy back home," referring to his gun. Maria was "pretty upset" and "screamed" at Leyda that she wanted defendant and Mendez to take their behavior somewhere else.

Maria saw Leyda talk to defendant and Mendez. Leyda then told Maria that it was okay, and they did not have the gun anymore.

Defendant and Mendez Get the Beer Pong Table

Leyda and Pa. testified that defendant and Mendez left the party to get a beer pong table from Mendez's house.[4]

Maria testified Mendez and defendant went to a car parked on the street. Mendez got into the driver's seat, and defendant was in the passenger seat. When the car was about four or five houses away, Maria saw someone lean out of the passenger window and fire two shots.

Pa. also testified that as defendant and Mendez drove away from the party, someone in the car fired a gun into the air.

---

[4] Bakersfield Police Officer Hensley defined beer pong: "You just position the cups in the triangular pattern [on the table], fill them with alcoholic beverages, and you take a standard Ping-Pong ball and you toss it from one end of the table to the other and try to make it inside the cup until eventually all the cups are gone, and whoever gets rid of all the cups before the other person wins. [¶] … [¶] And then you have to drink the beverages as your opponent makes them."

Maria testified that about an hour later, defendant and Mendez returned to the party with the beer pong table and more beer. Pa.'s three male friends had left the area by the time defendant returned.

Defendant and Mendez set up the beer pong table in the middle of the front yard. Defendant, Mendez, Leyda, and several other people took turns playing beer pong.

Additional Testimony About Defendant's Gun

At trial, Pa. testified she realized at some point during the party that defendant was carrying a gun inside his front waistband. Defendant was wearing a white T-shirt, and the gun was visible underneath it. Pa. testified that defendant lifted his shirt twice that night to display the gun, and he appeared angry when he did that.

P. testified he also saw defendant "flashing" the gun during the party, and the handle was sticking out of his waistband.

P. testified he heard four gunshots fired when defendant and Mendez left in the car to get the beer pong table.

P. further testified that after they returned with the table, defendant was standing in the front yard, by a planter box, and fired one shot into the air. Defendant and his friends laughed about it.[5]

Mendez and Miles Leave the Party

Leyda and Maria testified that Mendez and Miles left the party after midnight. Mendez said he had to pick up his girlfriend from work and drove away in his car.[6] Miles also said he was leaving and walked home because he lived in the next block. Defendant stayed at the party and did not leave with them.

---

[5] The police later found one expended .380-caliber cartridge casing on the ground by the planter box in the front yard.

[6] As we will explain below, Fabianna King, Mendez's girlfriend, testified for the defense that she worked at the Déjà vu Club, and defendant was at the club that night until just before it closed at 2:00 a.m. King testified she left work after 2:00 a.m., drove home, and Mendez was already there.

Maria testified that after Mendez and Miles left, Pa.'s three male friends returned to the party. They were the same people who left when defendant showed the gun to them. They entered the front yard but stayed near the fence. The three men were laughing and talking. Defendant walked up to the three men, pulled up his shirt, and again showed his gun to them. Maria testified defendant was "just smirking" and acted "territorial," and he did not allow the men to get very far into the front yard. The three men walked into the street. Pa. talked to them and they left. Defendant remained at the party.

Maria Tells Leyda the Party is Over

Maria testified that after the second incident where defendant showed the gun to the three men, she decided to shut down the party. Maria told Leyda that the party was over, and she wanted defendant to leave. Maria refused to speak to defendant because she was mad. Maria was afraid defendant was going to do something with the gun.

DEFENDANT SHOOTS LEYDA

The People introduced testimony from Maria, Leyda, P., and Pa. that defendant was the person who shot Leyda in the neck.

Leyda's Testimony

Leyda testified she realized that defendant had a gun tucked in his pants, over the top of his shirt. She could see the black handle sticking above his waistband. Maria spoke to Leyda about defendant. As Maria pointed at defendant, she told Leyda to tell him to put away the gun or leave. Defendant was standing in the front yard by the neighbor's fence.

Leyda walked up to defendant, looked directly at him, and told him to put away the gun or leave. Someone was standing next to defendant when she approached him.

Leyda could not remember everything that defendant said in response, but that defendant said he had "enough bullets to shoot me and my family." Leyda told defendant "not to do anything to my family, to go ahead and shoot me." Leyda made this statement

because her young son was near the front door, and she was afraid for the safety of her family. Defendant did not say anything in response.

Leyda was facing defendant about three feet away from him. They were standing near the neighbor's fence, and defendant was leaning on the fence.

Leyda testified the next thing that happened was that she was shot in the neck. Leyda fell and was unable to speak. Leyda could not remember if defendant was the only person standing directly in front of her when she was shot.

Maria's Testimony

Maria testified that after she told Leyda the party was over, she saw Leyda approach defendant. Maria could not hear Leyda's conversation with defendant because music was playing.

When the music stopped, Maria heard Leyda tell defendant, "If you're gonna shoot my family, shoot me first." Maria turned around and saw defendant extend his arm toward Leyda and shoot her. Leyda fell and Maria rushed to help her. Defendant again extended his arm, pointed the gun at everyone else in the front yard, and moved it around from side to side. Defendant walked to the gate and then ran away by himself.

P.'s Testimony

P. testified he was playing beer pong and heard Leyda tell defendant to put the gun away. Leyda was being nice to defendant. P. believed Ledya said something else, but he could not hear the conversation. P. then heard defendant say: "I have enough bullets to kill your family." Defendant was yelling and being aggressive.

P. heard Leyda reply, "[I]f you wanna to do that, then just shoot me." P. testified defendant took the gun out of his waistband, pointed it at Leyda, and P. heard one gunshot.

After Leyda fell, defendant said, "I told you not to mess with me, bitch." Defendant pointed the gun at everyone, waved it around, and ran away. P. testified defendant pointed the gun directly at him just before he left the front yard.[7]

Pa.'s Testimony

Pa. was standing by the front porch when she saw defendant and Leyda argue. Defendant and Leyda "screamed" at each other by the fence. The music was loud, and Pa. could not hear what they were saying. Defendant waved his hands and looked angry.

Pa. heard part of the conversation when there was a break in the music. Leyda said: "[I]f you're going to shoot somebody … shoot me." Defendant looked angry. Pa. saw defendant reach into his waistband and pull out something. Defendant was about two feet from Leyda.

Pa. heard a gunshot and saw Leyda fall. Defendant looked down at Leyda and said, "[Y]eah, bitch, I told you not to try me."

Pa. testified defendant turned around, pointed the gun at everyone else in the front yard, and headed to the gate. Defendant walked through the gate and then ran away.

The 911 Call

At 4:25 a.m., a 911 call was received that reported a shooting at Leyda's house.

Ulises Lomeli, one of the party guests, called 911, and the transcript of his call was introduced at trial. Lomeli told the dispatcher they needed an ambulance because "this dumb ass guy shot my friend … the person living in this house." Lomeli said they had been "chillin' having a good time … having a few beers and I'm sober as you can

[7] In addition to the attempted murder of Leyda, defendant was charged and convicted of counts 2 and 3, assault with a firearm on, respectively, Leyda and P.; and counts 4 and 5, misdemeanor displaying a firearm in a threatening manner to, respectively, Leyda and P.

tell." Lomeli said, "Some guy shot the girl… And he's acting brave, just stupid on alcohol and he f**king shot her." Lomeli said the gunman "took off."[8]

The Police Respond

At 4:29 a.m., Bakersfield Police Officers Hensley and Skidmore responded to Leyda's house. There was an ice chest on the front porch, cans of alcoholic beverages, and a beer pong table in the center of the front yard.

The officers found Leyda lying on the ground in the front yard, surrounded by people who were trying to help her. Leyda was bleeding from the neck, unconscious, and unresponsive.

The paramedics immediately transported Leyda to the hospital.

THE INVESTIGATION

After Leyda was taken to the hospital, Officers Henley and Skidmore interviewed the people at the house to determine the suspect's identity. Hensley did not ask the witnesses for details about what happened at the party, and instead focused on the actual shooting and the gunman's identity.

Pa.'s Statement

Officer Hensley pulled Pa. away from the other guests and talked with her. Pa. was emotional and crying, but she did not appear intoxicated.

Pa. said the shooter was "Zack Sanchez," and described him as a Hispanic male, 20 to 21 years old, five feet one inch tall, 100 pounds, thin build, with dark hair and

---

[8] At trial, Lomeli testified he did not want to be in court and could not remember what happened at the party or that he called 911, gave a statement to the police, or identified the gunman. When asked to listen to the recording of the 911 call, Lomeli testified that "[o]bviously, I'm not sober. Even one beer I wouldn't be sober," and claimed he was drunk that night.

Also, at trial, Maria testified that she was talking to Lomeli just before Leyda was shot, and Lomeli said he was "buzzing."

possibly green eyes, and wearing a white T-shirt and black shorts. Officer Hensley asked Pa. if she would be able to recognize the shooter if she saw him again, and she said no.

P.'s Statement[9]

Officer Johnson testified he interviewed P. on the night of the shooting. P. said he had been sleeping inside the house when he heard a gunshot that was apparently fired into the air. He went outside and encountered the suspect and Leyda at the beer pong table. P. said the suspect had a firearm inside the waistband of his shorts. P. said the suspect and Leyda were standing behind him, and they were arguing. The suspect said, "I'll show you," and Leyda said, "[S]how me, then." P. said he had a bad feeling and turned around. The suspect pulled the firearm out of his waistband and shot Leyda in the throat. The suspect yelled, "[L]et's go," pointed the firearm at P. and the other guests, then ran to a car with two or three other people.

P. said he did not know the gunman's name, but he would recognize him. P. thought the gunman was white, and he was wearing a white T-shirt, brown shorts, and had "a weird haircut."

P. said the top of the gun was gray and the bottom was black. "But they said it wasn't his gun. 'Cause he had his own gun and … his friends and him kept on switching guns."

Officer Johnson recorded his interview with P., and the tape was played for the jury.

Lomeli's Statement

Officer Skidmore spoke to Ulises Lomeli at the house. Skidmore testified Lomeli was cooperative. He suspected Lomeli might have been drinking, but he was making sense when he talked.

---

[9] The defense called Officer Johnson to testify about P.'s pretrial statements, and the People introduced the recording of Johnson's interview with P. on cross-examination.

Officer Skidmore testified that Lomeli said the shooter was a Hispanic male, five feet five inches tall, 160 pounds, wearing a white T-shirt and black shorts. Lomeli did not know the gunman's name, but thought he was "Richard," and they went to high school together. Lomeli said this person had been periodically lifting his shirt while he was playing beer pong and displayed a gun in his waistband. Lomeli told the man he should probably leave if he had a gun. The man placed his hand on the gun and asked Lomeli, "[W]hat did you say, man." Lomeli was scared the man was going to assault him. Lomeli moved away from the man but stayed at the party.

Lomeli said he saw Leyda arguing with the same man. Leyda told the man that he had to leave if he had a gun. Lomeli turned his back, heard a gunshot, looked around, and saw Leyda on the ground. Lomeli said that as the gunman left the front yard, he yelled back at everyone, "[D]on't test me." Lomeli immediately called 911.

Lomeli said he would be able to identify the gunman if he saw him again.

The Photographic Lineup at the House

At 4:34 a.m., Officer Hensley ran a record check for defendant based on Pa.'s information about the suspect's name. Hensley used the computer in his patrol car and obtained his mugshot. Defendant's address was listed as an apartment on Karma Court in Bakersfield.

Officer Skidmore testified that a photographic lineup was prepared for witnesses to look at while everyone was still at Leyda's house. Officers Hensley and Skidmore testified they read the appropriate admonishments before they showed the photographic lineup to the witnesses. Defendant's picture was in the No. 5 slot.

Officer Skidmore testified Lomeli identified defendant as the gunman and was positive about his selection.

Officer Hensley testified P. was separately shown the same photographic lineup while he stood in the street by one of the patrol cars. P. positively identified defendant as the gunman. No other witnesses were present when P. looked at the lineup.[10]

Pa. testified she was shown a photographic lineup and identified defendant as the gunman.

Officer Skidmore's Testimony About the Photographic Lineup Procedure

On cross-examination, defense counsel extensively questioned Officer Skidmore about the photographic lineup shown to Lomeli. Skidmore testified Lomeli and the other witnesses looked at the photograph lineup in the yard. Each person looked at the lineup individually, one at a time, without anyone else around them.

On redirect examination, Officer Skidmore again testified each person looked at the photographic lineup separately, and then the officers asked that person to stand to the side "so that they wouldn't intermingle as far as speaking with each other, and then we'd bring one person – then we'd bring the next person over, conduct that photo lineup, and then put them off to the side there, still within reach of – 'reach' meaning still within the vicinity where we could kind of keep an eye on them and things like that."

The Shell Casings

The officers found an expended .380-caliber shell casing in Leyda's front yard, next to a concrete planter box on the ground.[11]

A second expended .380-caliber casing was found on the property of the house next door to Leyda's home, on the other side of the neighbor's fence.[12]

---

[10] The prosecution introduced P.'s identification of defendant from the photographic lineup as rebuttal evidence.

[11] P. testified that defendant fired one shot in the air when he was standing in the front yard by a planter box.

[12] Leyda testified that immediately before she was shot, she was standing with defendant near the neighbor's fence, and defendant was leaning on the fence.

DEFENDANT'S ARRIVAL AT HIS MOTHER'S APARTMENT

Gloria Sanchez, defendant's mother, testified for the prosecution. Sanchez and her younger son lived in a two-story apartment on Karma Court. Sanchez testified defendant had moved out in June 2015, he no longer lived with them, and he did not have a key to the apartment.

Frances Lara also testified for the prosecution. She was a friend of defendant's mother. Lara and her two young grandchildren were staying overnight with Sanchez on August 1, 2015.Lara had never met defendant.

Sanchez and Lara testified defendant had not been at the apartment on August 1, 2015.

Defendant Arrives at the Apartment

Lara testified that around 4:40 a.m. on August 2, 2015, she was asleep when someone rang the front doorbell "real fast." Sanchez testified the doorbell was being continually pressed.

Lara testified the bell kept ringing for about 10 minutes, and "neither one of us wanted to open up the door." Lara testified that Sanchez looked out of a window and told her that it was "Zack."

Sanchez told Lara to open the door because she did not want to go downstairs. Lara went downstairs and opened the door. Defendant was by himself and not wearing a shirt. Lara did not see a car on the street or hear police sirens. Defendant did not say anything to her and ran upstairs. Lara also went upstairs and returned to her bedroom.[13]

Defendant Asks for an Alibi

Sanchez testified defendant walked into her bedroom. Defendant placed his cell phone, wallet, and identification on a shelf in her bedroom closet.

---

[13] At trial, Sanchez testified she never told Lara that defendant was at the door, said she did not want to open the door, or told Lara to go downstairs and open the door for him.

Sanchez testified defendant seemed to be angry. Defendant told his mother that he was in trouble, the police were coming, and they were going to talk to her. Defendant told Sanchez to tell his brother, William, that he was in jail.[14] Defendant asked Sanchez to "please tell the officer he was with us" at the apartment. Sanchez asked defendant why he was in trouble, and he did not respond.

Sanchez testified defendant left her bedroom and went into Lara's bedroom. Sanchez heard defendant ask Lara to "please tell the officer that he was here and he'll give [Lara] $20."

Lara testified defendant offered her $20 and said "he would pay me if I was to tell the cops that he was – that he was there." Lara did not know what he was talking about and told him no.

Defendant Gets a Call and Leaves

Sanchez testified defendant left Lara's bedroom, went into the upstairs bathroom, and closed the door. While defendant was in the bathroom, his cell phone started to ring. Sanchez retrieved the cell phone from her bedroom closet and gave it to defendant. Defendant stayed in the bathroom and talked to someone.

Sanchez testified when defendant left the bathroom, he again told Sanchez that the police would come and talk to her. Sanchez testified defendant had taken a shower, wrapped a towel around himself, went downstairs, and left.

Lara testified defendant ran downstairs and "took off." Defendant was wearing cargo shorts and black socks. Lara then heard sirens in the neighborhood. Lara and Sanchez testified the police arrived at the apartment shortly after defendant left.[15]

---

[14] Sanchez testified defendant was referring to another brother, not her young son who lived in the apartment.

[15] At trial, Lara testified she cooperated with the police and told them what had happened. Lara did not tell the police that night that defendant offered her $20 because they did not ask her that question.

Sanchez testified that Sergio Mendez later contacted her, asking to help defendant by telling the police that defendant had been at her house. Sanchez testified Mendez did not threaten her. Sanchez refused because defendant was 22 years old and an adult.

ARREST OF DEFENDANT

After Officer Hensley obtained defendant's name from Pa., he immediately broadcast defendant's address on Karma Court to other units.

By 4:36 a.m., other officers were on their way to Sanchez's apartment in response to Officer Hensley's dispatch.

Lara testified that defendant arrived at the apartment around 4:40 a.m.

At 4:44 a.m., Officers Berumen and Poteete arrived at Sanchez's apartment. They parked their patrol car about a block away and walked to the apartment. They knocked on the door and rang the doorbell for about 10 minutes; no one answered.

Officers Berumen and Poteete walked away from the door. Other officers arrived in the area and scattered around the apartment complex to look for defendant. Berumen stayed near the apartment's door. Defendant suddenly ran out of the apartment. He was holding a towel around his body with one hand and a pair of black cargo shorts with his other hand. Defendant's hair and body were wet.

Officer Berumen called defendant's name and stepped into his path. Defendant was surprised but acknowledged his name, and he was immediately arrested and placed in the patrol car. Defendant was wearing boxer shorts under the towel. Defendant did not appear intoxicated.

The officers searched Sanchez's apartment with her consent. They found laundry detergent in the upstairs bathroom and a cell phone on the back of the toilet. Sanchez

---

Sanchez testified she answered questions from the officers and allowed them to search the apartment. She did not tell the officers about what defendant said because they did not ask her.

testified she usually kept the laundry detergent downstairs, under the kitchen sink, and not in the upstairs bathroom.

Officer Beruman showed the cell phone to defendant, and defendant said it was his.[16]

DEFENDANT'S POSTARREST INTERVIEW

Around 7:00 a.m. on August 2, 2015, Officers Hensley and Skidmore interviewed defendant at the police station after he was arrested. The interview was recorded, and the video was played for the jury. Defendant was advised of the *Miranda*[17] warnings and agreed to answer questions. Defendant did not appear or act intoxicated.

Defendant said he lived with Sanchez, but he did not have a key to the apartment. On the morning of August 1, 2015, he decided not to go work in the fields. He stayed home and rode his bicycle with some young friends that afternoon.

Defendant said that just before he was arrested, he had been taking a shower because he was going to go work in the fields in the morning. He went outside and was arrested.

Officer Hensley asked defendant why his mother and her friend (Lara) said he got there about 15 minutes before the police. Defendant said that was not true, and he had been at the apartment all night. Hensley asked defendant why there were several people who said he had been at a party and in possession of a firearm. Defendant said that was not true, he had not been at a party, and he did not have a gun.

In response to the officer's questions, defendant said he did not know Leyda, he was never at her house, and he had been at his mother's apartment all day and night.

---

[16] Prior to trial, defendant moved to exclude his statement that the cell phone belonged to him. After an evidentiary hearing, the court denied the motion and held the statement was admissible. Defendant has not challenged this ruling on appeal.

[17] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

ADDITIONAL PROSECUTION EVIDENCE

Leyda's Injuries

Leyda was shot in the front of her neck, just below her chin. The bullet passed through her neck, fractured her C-5 cervical bone, less than an inch from her spinal cord, left a blood clot, and exited through the back of her neck. The bullet left scars from the entrance and exit wounds. Leyda had trouble breathing, her voice was hoarse, and she was told her right lung had been affected. Leyda required surgical procedures, needed a breathing tube, and was in a neck brace. She suffered soft tissue and vein damage from the penetrating injury through her neck.

Leyda was in the hospital for five days. After she was released from the hospital, she suffered a great deal of pain and required medication. She was fighting pneumonia in one lung. She could not move her left arm for two months. By the time of trial, over a year after the shooting, her arm had improved, but she still felt the effects of the bullet wound.

Cell Phone Photographs of Defendant with a Gun

The officers did not find a gun or ammunition inside Sanchez's apartment or in the surrounding neighborhood, and the weapon used to shoot Leyda was never recovered.

Defendant's cell phone contained a photograph of a gun. A separate photograph showed defendant holding what appeared to be the same gun, taken as a "selfie" using a mirror so the image was reversed.

P. and Maria testified that the gun in the cell phone photographs looked like the same gun that defendant had at the party.[18]

---

[18] In July 2016, just before trial, an investigator with the district attorney's office showed the photographs of the gun to Leyda's family. Pa. said defendant's gun looked similar based on the shape, but she was not sure because it was dark. P., Maria, and Leyda said the gun in the picture kind of looked like defendant's gun.

A firearm expert testified the gun in the first photograph was a Lorcin semiautomatic handgun. The expert believed that defendant was holding the same Lorcin handgun in the reverse-image "selfie." The expert testified the Lorcin semiautomatic handgun in the photographs appeared to be a .380-caliber, but it could also be a .32-caliber, and she could not be certain without personally examining the weapon.

Calls on Defendant's Cell Phone

The 911 call that reported the shooting was placed from Leyda's house at 4:25 a.m.

The prosecution introduced evidence about two calls on defendant's cell phone after the shooting. At 4:35 a.m. on August 2, 2015, an outgoing call was made from defendant's cell phone to a telephone number at a house where Trevon Miles lived. The call lasted 33 seconds.

At 4:37 a.m., defendant's cell phone received an incoming call from that same number, and the call lasted 56 seconds.

Facebook Messages on Defendant's Cell Phone

The People introduced evidence that the following Facebook messages were found on defendant's cell phone between defendant and Phillip Vasquez and were exchanged the day before Leyda's party.[19]

On July 31, 2015, at 7:42 a.m., Vasquez sent a message to defendant that said, " 'What we gonna do, doe?' " Defendant immediately wrote back, " 'Kill ppl.' " At 7:46 a.m., defendant sent Vasquez another message that said " 'FR.' " An officer testified he believed that was an abbreviation of "for real."

---

[19] During the hearing on the admissibility of the Facebook messages, the prosecutor stated Vasquez was a friend of defendant. However, the People did not introduce any evidence before the jury to explain Vasquez's identity. In issue II, *post*, we will address defendant's contentions that the court abused its discretion when it admitted evidence about the Facebook messages.

At 8:31 p.m. on July 31, 2015, Vasquez sent defendant a message that said, " 'What you want me to do, den?' " Twenty-five seconds later, defendant wrote, " 'Take to money and I will have the baby.' "[20]

The Video from Leyda's Party[21]

At trial, Leyda testified that she took a video at the party before she was shot. She thought she had deleted the video from her cell phone, but Pa. later found it. Leyda testified the video was taken in the front yard and showed the party.

An evidence technician testified he transferred the video from the cell phone to a DVD at regular speed. The technician produced a version of the same video that ran 20 percent slower than the original speed, and another version that was slow and zoomed in on the subjects.

Leyda testified the video showed defendant and Sergio playing at the beer pong table:

"Q. So you can recognize the defendant in the video?

"A. Yes.

"Q. And seeing the video, do you personally remember that moment where they were playing beer-pong and you were shooting the video?

"A. Yes.

"Q. And you do remember Zack being the person who's in the video?

"A. Yes."

---

[20] Detective Jeffrey Paglia testified that the reference to "the baby" in the message may have been to a gun. The court sustained the defense objections, ordered the testimony stricken, and admonished the jury to "disregard that and give it no weight whatsoever or at all."

[21] In issue I, *post*, we will review the sequence of events that led to the prosecution's disclosure of the video to the defense, and address defendant's argument that the court abused its discretion when it overruled his objections to the video because of discovery violations.

The three versions of the video were played for the jury. Leyda testified the video showed defendant and Sergio playing beer pong and pointed to defendant as the person on the far left of the screen. Leyda testified that defendant looked like he was drinking a beer.

Leyda testified there was a black or dark object in defendant's waistband, and that was his gun "[c]ause it was always tucked in" as she recalled from seeing it at the party. There was a third person in the video but Leyda could not remember or determine who that person was.

DEFENSE EVIDENCE

Alibi Witnesses

Veronica Alvarez and Fabianna King testified for the defense and provided an alibi for defendant. King was Sergio Mendez's girlfriend. Alvarez, defendant, Mendez, and King were friends.

Alvarez testified that on the night of August 1, 2015, she called Mendez and asked where defendant was and what he was doing. Alvarez called Mendez because she did not have defendant's telephone number. Mendez said defendant was not doing anything. Alvarez was upset about a conflict with a girlfriend and told Mendez that she needed to vent to someone. Alvarez asked if defendant could come by her house.

Alvarez testified that defendant walked to her house and arrived around 10:00 p.m. Around 11:00 p.m., defendant and Alvarez drove to the bluff area in Alvarez's car and walked around. They were there for about an hour and a half and then got something to eat.

Alvarez next drove to the Déjà Vu club where King worked. King had previously given Alvarez free passes to the club. They arrived at 1:00 a.m. or 1:20 a.m. and stayed for about 30 minutes. They left about the time of "last call" before the club closed at 2:00 a.m. Afterward, they went back to Alvarez's house and stayed there for a couple more hours.

Alvarez drove defendant to his home on Karma Court around 4:10 a.m. They arrived around 4:30 a.m. and talked in the car for about 15 minutes. Alvarez did not see the police while she was there. Defendant got out of the car and went inside, and Alvarez got back to her home around 5:00 a.m.

Alvarez testified she was with defendant from 10:00 p.m. until she took him back to his home on Karma Court. They never went to a party at Leyda's house. Later on August 2, 2015, Mendez told Alvarez that defendant had been arrested. Alvarez did not ask why he was arrested. Alvarez did not call the police because she preferred not to talk to them. She thought defendant would tell the police and someone would contact her. Alvarez finally talked to someone after she learned "it was pretty much getting really important that I did get in contact with somebody."

King's Testimony

Fabianna King testified Alvarez and defendant arrived at the Déjà Vu club on August 1, 2015. They were there for one to two hours and left about a half hour before the club closed at 2:00 a.m.

King left the club around 2:15 a.m. and drove home. Mendez was already there when she got home. King found out later that morning that defendant had been arrested and why he was arrested. Mendez later told King that he had been at Leyda's party.[22]

Leyda's Pretrial Statements[23]

The defense called Herman Caldas, an investigator with the district attorney's office, about his interview with Leyda on August 26, 2015, after she had been released

[22] Leyda and Maria testified that Mendez left the party after midnight. Mendez said he had to pick up his girlfriend from work and drove away in his car.

[23] The defense introduced evidence about some of the witnesses' pretrial statements and tried to argue their original accounts were inconsistent with their trial testimony.

from the hospital. Leyda had cancelled two previously scheduled interviews because she was in extreme pain from her injuries.

Leyda said her mother, Maria, told her that a guy was flashing a gun and pointed to defendant. Her mother said that he needed to leave. Leyda walked up to defendant, who was standing by the neighbor's fence. Leyda told him that he had to put the gun away because her family was there. Defendant replied that he had enough bullets to kill her and her family. Leyda said that he needed to leave, and if he wanted to shoot someone then he could shoot her. Defendant said, "I told you not to test me, bitch."

Leyda said the actual shooting happened very fast. Defendant was the only person standing close to her, but she did not actually see him shoot her. Caldas showed Leyda a photographic lineup, and she identified defendant as the person she was talking to before she was shot. Leyda did not say that she had taken a video at the party or deleted a video.

Paul Lambert, another investigator with the district attorney's office, testified he interviewed Leyda and her family on July 27, 2016. Leyda said defendant and Mendez left the party and returned with the beer pong table; they left a second time and returned with beer.

Leyda said before she was shot, Mendez said he had to leave and pick up his girlfriend because she was getting off work at the Déjà Vu club. Mendez told defendant to leave, but defendant refused. Mendez apologized to Leyda that he could not get defendant to leave. Maria said Mendez left around midnight, and Miles walked home about the same time.

Arrest of Defendant

The defense called Officer Poteete about defendant's arrest and the statements from Sanchez, his mother. Sanchez said defendant had been at the apartment earlier in the day and left before nightfall. Sanchez said defendant hardly stayed at the apartment, but he "comes and goes as he pleases." Sanchez did not say that defendant asked her for

an alibi, or that she heard defendant offer to pay Lara for an alibi. When the police interviewed Lara, she did not say that defendant offered to pay her for an alibi.

Pretrial Statements by Defendant's Mother

The defense called the prosecution's investigator, who testified that he interviewed Sanchez on November 18, 2015. He testified that Sanchez said she had not seen defendant on the day of the shooting, and he was not living with her at that time. Sanchez said that when defendant arrived at the apartment that night, "an older son's girlfriend named Eva" opened the door and let him in, and he was arrested shortly after that.

The defense introduced evidence that in November 2015, Sanchez gave information to a friend that she was possibly being intimidated. The information was passed along to the district attorney's office.

On December 2, 2015, Sanchez told the district attorney's investigator that Mendez took her to visit defendant in jail. Mendez told her, "You need to tell the police that he was at home with you" when the shooting happened. Mendez acted friendly, but Sanchez felt pressure to change her story.

Sanchez told the investigator that she subsequently received several telephone calls from Mendez and someone who was either Mendez's mother or girlfriend. They said she had to change her story and tell police that defendant was with her all night. As a result, Sanchez eventually changed her telephone number.

Sanchez told the investigator defendant had arrived at the apartment around 4:00 a.m., said he was in trouble and the police were coming, and went into the bathroom and took a shower. She heard him talking on his cell phone while he was in the bathroom. He left the apartment and the police arrived shortly afterwards.

CONVICTIONS AND SENTENCE

Defendant was charged and convicted of count 1, attempted premeditated murder of Leyda (Pen. Code, §§ 664/187, subd. (a));[24] counts 2 and 3, assault with a firearm on, respectively, Leyda and P. (§ 245, subd. (a)(2)); and counts 4 and 5, misdemeanor displaying a firearm in a threatening manner to, respectively, Leyda and P. (§ 417, subd. (a)(2)).

As to count 1, the jury found defendant personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)); as to counts 1 and 2, he personally inflicted great bodily injury upon Leyda (§ 12022.7, subd. (a)); and as to counts 2 and 3, he defendant personally used a firearm (§ 12022.5, subd. (a)).

Defendant was sentenced to life with the possibility of parole after seven years for count 1, attempted premeditated murder of Leyda, plus a consecutive term of 25 years to life for the section 12022.53, subdivision (d) firearm enhancement; and a consecutive midterm of three years for count 3, assault with a firearm on P., plus four years for the section 12022.5, subdivision (a) firearm enhancement. The court stayed defendant's sentence on the remaining counts and enhancements pursuant to section 654.

PROCEDURAL BACKGROUND FOR ADMISSION OF VIDEO

As set forth in the factual statement, the prosecution introduced a video from the party that Leyda took on her cell phone. Leyda testified the video showed defendant and Mendez at the beer pong table, and that defendant had a gun in his waistband.

On appeal, defendant contends the court abused its discretion when it granted the People's motion to introduce the video because the defense did not learn about it until after counsel gave her opening statement. Defendant argues the belated disclosure violated the statutory discovery rules and defendant's due process rights because counsel

[24] All further statutory references are to the Penal Code unless otherwise indicated.

had already said in opening statement that the evidence would show defendant was never at the party, and the video refuted that assertion.

We will address defendant's contentions in issue I, *post*. Before doing so, we must begin with the sequential history about how and when the video was discovered, based on the evidence that was introduced at a series of evidentiary hearings the court conducted outside the jury's presence.

Leyda Takes the Video at the Party

At some point during the party, Leyda tried to take a picture on her cellphone but recorded a video by mistake. After Leyda was released from the hospital, she found the video on her cellphone and deleted it. Leyda then gave that cellphone to her sister, Pa.

The Prosecutor Asks Leyda About any Photographs or Videos

On July 27, 2016, defendant's case was assigned to Judge Friedman for trial and the court heard the parties' motions in limine.

On that same day, the prosecutor and her investigator met with Leyda and her family. The prosecutor asked the family if they had any photographs or videos from the party that showed defendant was there. Leyda said she thought she had taken a video on her cell phone, she believed she had deleted it, and she did not know where it was. The prosecutor asked Leyda to immediately inform the investigator if she found the video.

On July 28 and 29, 2016, the court continued hearing motions and began voir dire.

On August 1, 2016, the court concluded voir dire and the jury was sworn.

Leyda's Sister Finds the Video

On or about July 28, 2016, Leyda's sister recovered the video from a backup file on the cell phone.

At some point prior to or on August 1, 2016, Leyda sent an e-mail to the prosecutor's investigator and attached the video from the party.

On or about August 1, 2016, the prosecutor's investigator sent an e-mail to Leyda, stating that he only received an audio file without any video. Leyda did not respond to this e-mail or contact anyone else in the district attorney's office.

Opening Statements

On the morning of August 2, 2016, the parties gave their opening statements to the jury.

The prosecutor stated that the jury would hear from several witnesses that defendant was at the party, he flashed a handgun, he shot Leyda in the neck, and the party guests immediately identified him to the officers as the gunman.

Defense counsel said in opening statement that Leyda was shot at the party, but the jury had to determine whether defendant was the person who shot her. Counsel stated defendant was not at the party and he was not guilty. Counsel further stated:

> "And you're going to hear from a couple of witnesses from the defense. You're going to hear from Fabianna [King] and Veronica [Alvarez]. Fabianna works at déjà vu, and then Veronica … is a friend of [defendant's], who was with him the entire night, and *they never went to that party*. They were driving around, went to déjà vu to visit … Fabianna [King] … and then Veronica [Alvarez] took [defendant] back home, and you'll hear that they were never there." (Italics added.)

August 2, 2016; the Prosecutor Learns About the Video

On the same day, immediately after opening statements, the People called Officer Hensley as the first witness. After Hensley finished his testimony, the court excused the jury for lunch at approximately 11:30 a.m.

During the lunch break, the prosecutor spoke to Leyda and other witnesses about complying with the court's evidentiary orders when they testified.

In the course of that conversation, Leyda told the prosecutor that she found the video of the party on her cell phone and it showed defendant was there. Leyda then showed the video to the prosecutor for the first time. The prosecutor asked Leyda to

email it to her. Leyda had trouble sending the video to the prosecutor, so she took screen shots and sent the still images instead.

August 2, 2016; the Prosecutor Advises the Court and the Defense About the Video

After lunch on August 2, 2016, the court reconvened without the jury.

Defense counsel said the prosecutor had just told her that Leyda had provided video footage of the party that showed defendant was at the house, presumably with a gun in his waistband area. Defense counsel said the prosecutor had left messages on her email and office line during the lunch break, but counsel had not checked her messages and only found out about the video when counsel returned to the courtroom. Counsel had only seen a screen shot and not the video.

Defense counsel objected to the video as late discovery and complained that she had "already given my opening statement, which is completely at ends with this video." Counsel argued introduction of the evidence would violate defendant's due process rights to a fair trial.

The prosecutor explained she spoke to the witnesses during the lunch break about complying with the court's evidentiary orders. When the prosecutor talked to Leyda, "that's when she said that she found the video, but she couldn't send it, so she took still shots of it and sent it to me, so then I could go print them, and that's just proving when this occurred."

The prosecutor moved to introduce the screen shots and the video into evidence and suggested an instruction could be given about the late discovery. The prosecutor acknowledged that defense counsel had already given the opening statement but argued there was going to be "overwhelming evidence that [defendant] was at the party, which, of course, is a contradiction to what they said" in opening statement that defendant was never there, and the video "just corroborates what the witnesses are already going to say."

In response to the court's questions, the prosecutor said Leyda had mentioned the video a few days earlier. Leyda thought she deleted it, and the prosecutor said to let the investigator know right away if she found it. The prosecutor said she did not tell defense counsel at that time because she did not "think that there was anything because [Leyda] said she deleted it, so this was actually a surprise today when she actually had something."

The court asked the parties for briefing on late discovery and whether the video was admissible.

The Trial Continues

The trial continued on August 2 and 3, 2016, with testimony from Leyda, Pa., Maria, and P., all of whom testified that they saw defendant at the party, defendant had a gun, and defendant shot Leyda in the neck.

Defendant's Motion to Exclude the Video

On August 3, 2016, defendant filed a motion to exclude the video because the People's untimely disclosure violated the statutory discovery provisions and his constitutional rights to due process and a fair trial. Defendant complained the prosecutor knew prior to opening statements that a video might exist but failed to notify the defense, and the appropriate sanction should be exclusion of the video.[25]

The People's opposition stated that Leyda stated prior to trial that she had deleted the video. The prosecutor did not know about or see the video until she met with Leyda during the lunch break on the first day of trial, after which she notified the court and defense counsel. The People argued the video was admissible because it was relevant to corroborate the testimony of the witnesses who said defendant was at the party.

[25] Defendant never moved for a mistrial based on the late discovery of the video.

The Court's Evidentiary Hearings on the Video

The court continued with the trial before the jury. In the course of the trial, however, the court held a series of evidentiary hearings outside the jury's presence on whether the video was admissible.

At one of these hearings, the court asked the prosecutor if Leyda told her about the video during the July 27, 2016, interview. The prosecutor said that on that day, she asked Leyda if she had any photos or videos from the party that showed defendant was there. The prosecutor said Leyda was "very vague" and said thought she had a video and deleted it. Leyda "said something about Googling to try to find it, which I didn't know what that meant, and that kind of gave me the sense that okay, this doesn't really exist or, if it did exist at one point, it's not available, so I kind of just brushed it off." The prosecutor said that Leyda "wasn't adamant about yes, I have a video that shows the defendant in it. She was very vague about it. She said I think I have a video. I'm not sure. I have to look. I think I deleted it. [¶] And so that's when I told her, I said, well, if you come across whatever video you're talking about, then make sure you let us know right away, and she never told us until earlier this week."

The prosecutor said she did not know about the video until August 2, 2016, after opening statements, when she met with the family during the lunch break to advise them about the court's evidentiary rulings.

The prosecutor said she was having trouble sending the video to defense counsel, so counsel watched the video on the cell phone. The court also watched the video on the cell phone and said that it was very brief and showed two subjects, one of whom was supposed to be defendant, but it was hard to identify the faces on the video.

An evidence technician later transferred the video from the cell phone to a DVD, created two slower versions of the video, and it was transmitted to the defense.[26]

---

[26] As explained in the factual statement, the evidence technician testified at trial that he prepared a DVD with the original version of the video, a version that was 20

The prosecutor advised the court the video had sound but "[y]ou can't hear any actual words, it's just noise, because it's such a short video." The video was three to five seconds long.

Ledya's Testimony at the Evidentiary Hearing

Leyda testified at an evidentiary hearing outside the jury's presence about how she mistakenly took the video at the party, deleted it after she was released from the hospital, she told the prosecutor that it had been deleted, and then her sister found it on the cell phone.

Leyda testified that she emailed the video to the prosecutor's investigator, and he replied in an e-mail that he only received audio and not the video. Leyda testified that around noon on August 2, 2016, she told the prosecutor about the video for the first time and played it for her.

Leyda watched the video at the evidentiary hearing and testified that it showed defendant and Mendes by the beer pong table. Defendant was on the far left side of the screen's image. Leyda testified there was something protruding from defendant's pants, and it was his firearm.

The Prosecutor's Argument at the Evidentiary Hearing

The prosecutor advised the court that she talked to the investigator, who reported that he received Leyda's email with the video on August 1, 2016. According to the prosecutor, the investigator said "it wasn't even a video … you couldn't see anything. You could only hear that screaming that we heard in the video." The prosecutor stated:

> "And there wasn't a visual. It didn't show anything. So he didn't think there was anything discoverable or to turn over because that's not a video or photo that they said they were trying to look for. [¶] So then he told – he emailed [Leyda] back on Monday [August 1], said I only have it – I can only hear something. There's not a video. And she just replied okay,

---

percent slower than normal speed, and a slower version that zoomed on the features of the people in the video.

> sounds good, and there wasn't anything really after that. [¶] So Tuesday [August 2] is the first time he actually saw it on her phone, which is when I saw it at noon…."[27]

The prosecutor acknowledged defense counsel was concerned the video "completely contradict[ed]" counsel's opening statement about defendant's alibi. The prosecutor argued that the entirety of the evidence also contradicted the defense alibi claim. The video was just another piece of evidence that corroborated the witnesses' testimony that defendant was at the party and the gunman.

The prosecutor further argued the video was not in the People's possession until Leyda sent her the still photos during the lunch break on August 2, 2016, since the investigator had only received the audio before that time.

Defense Counsel's Argument

Defense counsel acknowledged that her opening statement claim that defendant was not at the party was going to be contradicted by the People's witnesses, but "what people say who were at the party is completely different than a video, which would have more of an impact than people's word[s]…."

Defense counsel stated the People were aware of the video on July 27, 2016, Leyda tried to e-mail it to the investigator on August 1, 2016, and he was able to open the audio portion.

> "[O]nce the People were told about this video [on July 27, 2016], I think they have an obligation, one, to tell the defense, and two, to have their tech guy at that point start to extract the video from whatever source, whether it's Google or [the sister's] phone or Leyda's phone, and they did not do that…."

The court asked defense counsel how her opening statement would have been different if she had known about the video. Counsel replied:

---

[27] The prosecutor advised the court the investigator was present "if you wanted to hear more information from him further." Neither the court nor defense counsel asked for testimony from the investigator, and the evidentiary hearing continued with the prosecutor's statements about what the investigator told her.

> "I might have said it differently had I know that there was a video. I might have said, you know, he was there for a portion of the time, but not the entire night."

The prosecutor replied the investigator only received an audio file when Leyda e-mailed it to him, "[s]o in his mind he didn't think that a video even existed at that point as well." The prosecutor did not notify the defense when the investigator received the email with the audio file because "it was nothing. I mean, we've heard it. You can't make out a word. It's very short, just sounds like a noise, and to me that's not evidence."

The Court Admits the Video

The court overruled the defense objections and admitted the video.

> "I'm going to find under Evidence Code 352 that the probative value outweighs the prejudicial impact. It does seem to be late, *but good cause has been shown under … Section 1054.7.*
>
> "It still is not clear as to who those two gentlemen are, but it does show – it does show a party in the area that the witnesses have indicated on photographic exhibits that the beer-pong table was located there and there were certain individuals there. It's up to the jury to make a determination.
>
> "However, there should be some consequence for the untimely presentation of this. It's not [the] People's fault, but I'm going to have counsel – both can prepare the [CALCRIM No.] 306, untimely disclosure of evidence, and give me your respective versions of it, and then I'll compare it to mine as to what should be read to the jury." (Italics added.)[28]

Leyda's Testimony to the Jury About the Video

Thereafter, People recalled Leyda to testify before the jury as a foundational witness for the introduction of the video. In the course of that testimony, the jury learned about the belated discovery of the video.

---

[28] As we will discuss in issue I, the People concede on appeal that the court's findings do not constitute good cause as defined by section 1054.7, and argue any error is not prejudicial.

Leyda testified that on August 2, 2016, she showed the prosecutor a video on her cell phone. Leyda was not able to send the video to the prosecutor but she took screenshots and sent those instead.

"[THE PROSECUTOR]. Now, was that in response to me asking you last week whether you had any videos or photos from your party?

"A. Yes.

"Q. On the 27th [of July] when I asked you that, what did you say?

"A. That I might not have them because I deleted them?

"Q. Because you deleted them?

"A. Yes.

"Q. And when did you delete them?

"A. When I got out of the hospital?

"Q. However, were you able to find a video?

"A. Yes.

"Q. Who found it?

"A. My sister. [¶] … [¶]

"Q. Were you aware that it still existed?

"A. No."

Leyda testified that after her sister found the video, Leyda watched it and recognized defendant and Mendes playing beer pong.

"Q. So you can recognize the defendant in the video?

"A. Yes.

"Q. And seeing the video, do you personally remember that moment where they were playing beer-pong and you were shooting the video?

"A. Yes.

"Q. And you do remember [defendant] being the person who's in the video?

"A. Yes."

The three versions of the video were played for the jury. Leyda testified that defendant and Mendes were the two people playing beer pong and pointed to defendant as the person on the far left of the screen. Leyda testified there was a black or dark object in defendant's waistband, and that was his gun "[c]ause it was always tucked in," as she recalled from seeing it the party.

Cross-examination of Leyda

On cross examination, Leyda testified she spoke to the prosecutor on July 27, 2016, and was asked if she had any video or pictures of the party. Leyda told the prosecutor that she thought so but might have deleted them. Leyda had given that cell phone to her sister and asked her sister about the video. Her sister thought she had seen it in "the Google backup." Her sister found the video on the cell phone, and Leyda tried to email it to the district attorney's investigator. Leyda spoke to the prosecutor at lunch on August 2, 2016, and showed her the video from her cell phone for the first time.

CALCRIM No. 306

After the court admitted the video, it asked the parties to prepare a version of CALCRIM No. 306, the untimely disclosure of evidence, to address the late discovery. The pattern instruction states in relevant part:

"Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial.

"An attorney for the (People/defense) failed to disclose: <describe evidence that was not disclosed> [within the legal time period].

"In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure…."

Defense counsel asked the court to modify the second paragraph to state: "An attorney for the People failed to disclose the video" within the legal time period.

The prosecutor objected to any version of CALCRIM No. 306 because the video was never in the prosecution's possession, the prosecutor did not see the video until the lunch break on August 2, 2016, and she immediately told defense counsel about it. Defense counsel replied that the prosecutor knew the video might exist as of July 27, 2016, and failed to tell the defense.

The court said, "I can't see where the … People sat on anything or misled the defense." The court proposed modifying the instruction to state that Leyda failed to provide the video in a timely manner.

Over defendant's objections, the court gave the following version of CALCRIM No. 306 to the jury.

> "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law, *unless good cause if shown*. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial.
>
> "*Leyda Zavaleta disclosed a video, People's Exhibit 46, outside of the fixed time period on August 4, 2016, to both the People and Defense*.
>
> "In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure." (Italics added.)[29]

Closing Arguments

In her closing argument, the prosecutor said defendant and Mendez were at the party and "this is evidenced by the cell phone video that you've seen. And, of course,

---

[29] The court and defense counsel learned about the video on August 2, 2016. Leyda was unable to e-mail it, and the prosecutor's staff was initially unable to transfer it to a larger screen. On August 4, 2016, the court, defense counsel, and defendant watched the video on Leyda's cell phone for the first time.

feel free to look at it again…. You can see defendant in the cell phone video with [Mendez] playing beer pong…."

Defense counsel's closing argument extensively addressed and questioned the reliability of the witnesses who identified defendant as the gunman. Counsel argued defendant was not guilty or, in the alternative, the crime was the lesser offense of attempted voluntary manslaughter. Defense counsel did not address the video or the alibi testimony from Alvarez and King.

In rebuttal, the prosecutor argued that if the defense story from Alvarez and King was true, "why would every person" interviewed at the scene identify defendant as the gunman. The prosecutor continued:

> "Now, if the defense story was true, why would there be a video – yes, short video, and I believe [Leyda] said she was trying to shoot a photo and it ended up being a video – why would there be a video showing him at the party that night? If the defense story was true, why would [defendant] be in such a hurry to get into his mom's house. He was frantically ringing that doorbell over and over. Why would he enter and tell his mom, 'If the cops come, tell them I was here all night'? Why would he tell Francis Lara, 'Tell the cops I was here all night and I'll give you $20'?..."

DISCUSSION

I. The Admission of the Video

Defendant contends the court committed prejudicial error when it granted the People's motion to admit the video that Leyda took at the party and that Leyda testified showed defendant with the gun in his waistband.

Defendant asserts the People violated the statutory discovery rules because the prosecutor was aware a video may have existed as of July 27, 2016, the prosecutor acknowledged Leyda had tried to email the video to the investigator as of August 1, 2016, and prosecutor was "dilatory" in failing to obtain the video prior to defense counseling giving her opening statement on August 2, 2016.

Defendant further argues the court's finding of good cause for the delayed disclosure was incorrect as a matter of law pursuant to the provisions of section 1054.7, the court abused its discretion when it admitted the video in violation of his due process right to a fair trial, and the error was prejudicial pursuant to *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

The People concede that the court's finding of good cause for the delayed discovery was not supported by the definition of that phrase in section 1054.7. However, the People assert the prosecutor did not have a statutory obligation to tell the defense about the possible existence of a video on either July 27, 2016, when Leyda said she thought she had a video but deleted it, or on August 1, 2016, when the investigator advised Leyda that her email only contained an audio file. The People argue the prosecutor complied with the statutory discovery provisions because she promptly informed defense counsel about the existence of the video on August 2, 2016, when Leyda showed it to the prosecutor during the lunch break.

The People further argue that while the disclosure occurred after defense counsel's opening statement about defendant's alibi claim, any error was not prejudicial because of the overwhelming evidence from the People's witnesses that defendant was at the party, and the weakness and inconsistencies in defendant's alibi defense.

We will review the prosecution's constitutional and statutory discovery obligations, the statutory definition of good cause, and conclude that to the extent the court's discovery rulings were erroneous, the errors were not prejudicial.

A. Brady

In *Brady v. Maryland* (1963) 373 U.S. 83, the court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Id.* at p. 87.) "The high court has since held that the duty to disclose such evidence exists even though there has been no request by the

accused [citation], that the duty encompasses impeachment evidence as well as exculpatory evidence [citation], and that the duty extends even to evidence known only to police investigators and not to the prosecutor [citation]." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 175.)

However, *Brady* did not create a constitutional right to discovery of the prosecution's evidence against the accused, and *Brady* has not been violated when the prosecution fails to disclose unfavorable or inculpatory evidence. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559–560; *Gray v. Netherland* (1996) 518 U.S. 152, 168; *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 468; *People v. Verdugo* (2010) 50 Cal.4th 263, 281.)

Brady was not implicated in this case. The parties agree that the People sought to introduce the video to corroborate the testimony from the prosecution witnesses that defendant was at the party, and it thus constituted inculpatory evidence.

B. Section 1054 et seq.

Aside from *Brady*, the prosecution has a separate statutory duty to disclose specified information to the defense pursuant to the reciprocal discovery provisions codified in section 1054 et seq. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1133, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 373; *People v. Superior Court* (*Dominguez*) (2018) 28 Cal.App.5th 223, 233.)

Section 1054.1 states:

> "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, *if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies*:
>
> "(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
>
> "(b) Statements of all defendants.

> "(c) *All relevant real evidence seized or obtained as a part of the investigation of the offenses charged*.
>
> "(d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
>
> "(e) Any exculpatory evidence.
>
> "(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial." (Italics added.)

The disclosures required by section 1054.1 have been interpreted to address testimony and evidence that will be introduced in both the prosecution's case-in-chief and rebuttal. (*People v. Mireles* (2018) 21 Cal.App.5th 237, 248; *People v. Gonzalez* (2006) 38 Cal.4th 932, 956–957; *People v. Jordan* (2003) 108 Cal.App.4th 349, 357.)

"Section 1054.1 is notably caveated: The information named must be disclosed only 'if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies.' (§ 1054.1.) Case law has interpreted this requirement to encompass not only information actually possessed but that ' "within the possession or control" of the prosecution' or put another way, ' "reasonably accessible" to it.' [Citations.] In other words, the statutory phrase 'in the possession' is not read literally so as to very narrowly cabin the materials that can be sought. (§ 1054.1.) Rather, it serves primarily to 'clarify and confirm that the prosecution has no *general duty* to seek out, obtain, and disclose all evidence that might be beneficial to the defense.' [Citation.]" (*People v. Superior Court* (*Dominguez*), *supra*, 28 Cal.App.5th at p. 234.)

C. Good Cause

As set forth above, the court found to the extent the prosecutor failed to timely disclose the video, that failure was excused by good cause. As relevant to this finding, section 1054.7 states in pertinent part:

> "The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made *immediately*, *unless good cause* is shown why a disclosure should be denied, restricted, or deferred. *'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.*" (Italics added.)

Upon request of any party, the court may conduct an in camera hearing on the showing of good cause. (§ 1054.7; *People v. Anderson* (2018) 5 Cal.5th 372, 395–396; *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1133.)

D. Discovery Sanctions

If a party fails to comply with the statutory discovery requirements, "a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." (§1054.5, subd. (b); *People v. Verdugo*, *supra*, 50 Cal.4th at p. 280.) The court may prohibit a witness from testifying only if all other sanctions have been exhausted. (§1045.5, subd. (c); *People v. Superior Court* (*Mitchell*) (2010) 184 Cal.App.4th 451, 458–459.)

A court's rulings on discovery, violations, and sanctions are reviewed for an abuse of discretion. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1105; *People v. Lamb* (2006) 136 Cal.App.4th 575, 581; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 792–793.)

E. Analysis—Discovery

Section 1054.1 requires the prosecutor to disclose evidence to the defense "if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies…." As of July 27, 2016, when the court was hearing pretrial motions, neither the prosecutor nor her investigator had possession or had seen any videos or photographs from the party. Leyda said she might have taken a video, but she had deleted it. The prosecutor did not have any evidence to disclose to the defense.

On or before August 1, 2016, Leyda emailed the video to the prosecutor's investigator after her sister found the video on the cell phone's backup file. It is undisputed that the investigator responded to Leyda on August 1, 2016, and told her that he had only received an audio file and not a video. Leyda did not further communicate with the investigator or independently contact the prosecutor. It is not clear whether the prosecutor in charge of the case knew that Leyda had tried to send the video file to the investigator.

> "Under *Brady*, the prosecutor's duty extends to evidence 'known to the others acting on the government's behalf' [citation], '[b]ut the prosecution cannot reasonably be held responsible for evidence in the possession of *all* government agencies, including those not involved in the investigation or prosecution of the case .... "[I]nformation possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have a duty to search for or to disclose such material." [Citation.]' [Citations.] [¶] Similarly, the reciprocal discovery statute refers only to evidence possessed by the prosecutor's office and 'the investigating agencies.' (§ 1054.1.) There is no reason to assume the quoted statutory phrase assigns the prosecutor a broader duty to discover and disclose evidence in the hands of other agencies than do *Brady* and its progeny." (*People v. Zambrano*, *supra*, 41 Cal.4th at pp. 1133–1134.)

The prosecutor never told the court that she was not aware of the email exchange between Leyda and the investigator – who was clearly part of the prosecution's

investigative team. The investigator was apparently present and available to testify at the evidentiary hearing, but he was not called by the prosecution or defense to explain what he knew and whether he told the prosecutor about it.

The court ultimately overruled the defense objections to the video and found good cause for the delayed disclosure under section 1054.7 because it was "not [the] People's fault" for "the untimely presentation" of the video. As the People concede, however, the court's finding of good cause is not supported by the statute or the record. Section 1054.7 expressly limits good cause "to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." There was no evidence that either Leyda or the prosecutor failed to disclose the existence of the video because of any threats or possible danger.

F. Analysis—Prejudice

An erroneous discovery ruling is subject to review under the standard of prejudice set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Verdugo*, *supra*, 50 Cal.4th at p. 280.) The judgment will be affirmed unless it appears reasonably probable the defendant would have achieved a more favorable result in the absence of the error. (*People v. Mora and Rangel*, *supra*, 5 Cal.5th at pp. 468, 473; *People v Mireles*, *supra*, 21 Cal.App.5th at p. 249; *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1135, fn. 13.)

> "Appellate review under *Watson* … focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*People v. Breverman* (1998) 19 Cal.4th 142, 177; *People v. Beltran* (2013) 56 Cal.4th 935, 956.)

"The proper exercise of a trial court's discretion under section 1054.7 does not violate a criminal defendant's confrontation or due process rights. [Citation.]" (*People v. Thompson, supra,* 1 Cal.5th at p. 1105.) In this case, however, defendant argues the court's discovery and evidentiary rulings violated his constitutional rights to due process and a fair trial, and the error was not harmless beyond a reasonable doubt under *Chapman v. California, supra,* 386 U.S. 18. (See, e.g., *People v. Gonzalez, supra,* 38 Cal.4th at p. 961.)

To the extent that the court abused its discretion when it overruled defendant's objections to the video and the requested version of CALCRIM No. 306, the error is harmless under any standard of review.

When the prosecution advised the court and defendant about the existence of the video, defense counsel's immediate complaint was that the belated disclosure was prejudicial because it occurred the day after she had given her opening statement, where she committed defendant to an alibi defense. The court asked counsel how her opening statement would have been different if she had known about the video, and counsel said that she "might have said it differently had I know that there was a video. I might have said, you know, he was there for a portion of the time, but not the entire night."

While defense counsel may have desired to modify her opening statement in light of the video, counsel was already aware of the numerous witnesses who were going to testify that defendant was at Leyda's party, he possessed and had displayed a gun, and he fired a gunshot at her at point-blank range. While defense counsel questioned the officers and the witnesses about how and when they identified defendant immediately after the shooting, the defense never moved to exclude the pretrial identifications or argued that the photographic lineup procedures were inappropriate or suggestive.

More importantly, there was powerful direct and overwhelming evidence of defendant's guilt without regard to whether the video corroborated the statements from the eyewitnesses. The officers who initially arrived at the scene testified that Pa.,

Leyda's sister, immediately identified defendant by name as the gunman. The other witnesses did not know his name but identified him from the photographic lineup shortly after the shooting. The witnesses never wavered from their identification of defendant or said the suspect could have been someone else. The witnesses not only stated that defendant had been at the party, but that he had a gun in his waistband, he flashed it at other party guests, he had fired at least one shot in the air earlier in the evening, and he may have fired a shot out of Mendez's car when they left to get the beer pong table. They saw him pull out the gun and shoot Leyda in the neck, and then aim the gun at the other guests as he ran from the front yard.

Moreover, defendant's mother and her houseguest both testified that defendant suddenly arrived at the apartment at 4:40 a.m., he said the police were going to arrive, and he asked them to falsely say that he had been at the apartment that night. After defendant was arrested, he told the police he had been riding bicycles with young friends and then spent the evening at his mother's apartment, and he never mentioned anything about being with Alvarez or going to see King at the club. Just days before trial, the two alibi witnesses gave statements claiming that he had been with them, but their statements were inconsistent with defendant's postarrest statements.

There was, thus, strong direct evidence of defendant's guilt beyond a reasonable doubt, completely independent of a video that lasted three to five seconds, so that any errors resulting from the court's discovery rulings were not prejudicial under either *Watson* or *Chapman*. (See, e.g., *People v. Mora and Rangel*, *supra*, 5 Cal.5th at pp. 473–474; *People v. Mireles*, *supra*, 21 Cal.App.5th at p. 249; *People v. Elder* (2017) 11 Cal.App.5th 123, 133.)

II. The Facebook Messages

As set forth above, the People introduced Facebook messages between defendant and another person that were found on defendant's cell phone, and had been exchanged

the day before Leyda's party, that included defendant's message that he was going to " '[K]ill ppl.' "

On appeal, defendant contends the court abused its discretion when it granted the People's motion to admit this evidence because the messages were irrelevant and prejudicial.

A. Pretrial Motion

Prior to trial, the People moved to admit Facebook messages between defendant and Phillip Vasquez and argued the evidence was relevant to show defendant's intent and state of mind.

Defendant objected because the messages lacked a proper foundation and constituted inadmissible hearsay, prior bad acts and improper character evidence. Defendant argued the messages were prejudicial under Evidence Code section 352 and violated his due process right to a fair trial.

B. The Evidentiary Hearing

The court addressed the messages at an evidentiary hearing in the midst of trial. The court asked the prosecutor about Phillip Vasquez's identity and whether his name had come up during the trial. The prosecutor said no, but that Vasquez was one of defendant's friends and "part of their larger group of friends, also with Sergio Mendez."

The prosecutor advised the court that the Facebook messages began on July 31, 2015, the day before Leyda's party.[30] Vasquez asked defendant, " 'What are we gonna do, doe?' " Defendant replied, " 'Kill ppl.' " A few minutes later, defendant wrote to Vasquez, " 'FR.' " The prosecutor said that "doe" meant "though" and "FR" meant "for real." The prosecutor argued this exchange was relevant to show defendant's intent to kill "people," and "for real" meant it was really going to take place. The court asked whether the evidence showed an intent to kill someone at the party, or to kill people in

[30] Leyda's party started on the evening of August 1, 2015, and she was shot around 4:25 a.m. on August 2, 2015.

general. The prosecutor argued the statements showed he had the intent to kill people in general, "he had the state of mind and he was looking for the opportunity."

The prosecutor said in the next exchange, Vasquez wrote to defendant at 8:31 p.m. on July 31, 2015, " 'What you want me to do den?' " Defendant replied, " 'Take the money and I will have the baby.' " The prosecutor said "den" meant "then" and "baby" was a "common" term for a gun.

The prosecutor said that defendant sent a photograph of guns to Vasquez. At 5:31 a.m. on August 1, 2015, Vasquez wrote to defendant, " 'That's what you guys came up on,' " referring to the picture of the guns. At 5:34 a.m., defendant wrote, " 'I got it for 400.' " At 5:37 a.m., defendant wrote, " 'I will kill more ppl.' " At 5:40 a.m., Vasquez replied, " 'Let's f[**]k some bitches.' "

The prosecutor argued the photograph of the guns and the messages were relevant to show defendant was in possession of guns. The prosecutor conceded none of the guns in the photograph were used to shoot Leyda. The prosecutor argued the final exchange was relevant to show that defendant's intent to kill was "not a momentary thought. It's actually an extended intent." The prosecutor claimed the messages were relevant and probation because they were written "incredibly close in time to the shooting where he did shoot the victim through her neck."

Defense counsel renewed her objections and argued there was no foundation for the messages because anyone could have sent them if the cell phone was unlocked or someone knew defendant's security code. Counsel further argued the photograph of the guns should be excluded because it showed "an assault rifle or a machine gun or a high-capacity type of firearm" that was not used in this case. Defense counsel also objected because the messages were hearsay and prejudicial, particularly the photograph of the guns, and inadmissible character evidence because they showed prior bad acts. Counsel argued the evidence violated defendant's due process right to a fair trial.

C. The Court's Ruling

The court held defendant's message to Vasquez, that he was going to " '[k]ill ppl,' " was admissible to show intent and was not prejudicial under Evidence Code section 352.

The court held that in contrast to that first message, the photograph of the assault rifle and guns that defendant sent to Vasquez, and defendant's second message that " 'I will kill more ppl,' " were both inadmissible under Evidence Code section 352 because the probative value was outweighed by the prejudicial impact and the "total lack of relevancy."

> "I think in the first conversation the probative value of showing the gentleman's intent is relevant; however, if the connotation is to do mass killings, I think that part …, especially with the recent developments…. [¶] [T]he prejudicial factor is astronomical, and I'm not going to permit this gentleman to have that on him. [¶] I don't think it's relevant and no mention be made of assault rifles. I don't want that picture shown…."

D. Trial Evidence

As set forth above, the prosecution introduced evidence at trial that on July 31, 2015, at 7:42 a.m., Vasquez sent a message to defendant that said, " 'What we gonna do, doe?' " Defendant immediately wrote back, " 'Kill ppl.' "

At 7:46 a.m., defendant sent Vasquez another message that said " 'FR.' " An officer testified he believed that was an abbreviation of "for real."

At 8:31 p.m. on July 31, 2015, Vasquez sent defendant a message that said, "What you want me to do, den?" Twenty-five seconds later, defendant wrote, " 'Take to money and I will have the baby.' "

Detective Paglia, who testified about the messages, said that the reference to "the baby" in the message may have been to a gun. Defense counsel objected. The court sustained the defense objections, ordered the testimony stricken, and admonished the jury to "disregard that and give it no weight whatsoever or at all."

E. Analysis

" 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) " 'Except as otherwise provided by statute, all relevant evidence is admissible.' [Citations.] 'Evidence is relevant if it tends " 'logically, naturally, and by reasonable inference' to establish material facts ...." ' [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 892.)

Evidence of a defendant's prior acts is inadmissible when offered to show that he had the criminal disposition or propensity to commit the charged offense. However, such evidence is admissible when relevant to establish some fact other than character or disposition, such as motive or intent, if the acts are sufficiently similar. The least degree of similarity is required in order to prove intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393, 402; *People v. Fuiava* (2012) 53 Cal.4th 622, 667.)

"A trial court may exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. [Citations.]" (*People v. Scott* (2011) 52 Cal.4th 452, 490.)

> " ' "Prejudice" as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. Unless the dangers of undue prejudice, confusion, or time consumption " 'substantially outweigh' " the probative value of relevant evidence, a section 352 objection should fail. [Citation.] " 'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging" ' [Citation.]" [Citation.] [¶] The prejudice that section 352 " 'is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.]

> 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]' [Citation.]" [Citation.] In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' [Citation.]" (*People v. Doolin*, *supra*, 45 Cal.4th at pp. 438439.)

The trial court has broad discretion to determine whether evidence is relevant or admissible under Evidence Code sections 1101 and 352, and the court's rulings will not be disturbed on appeal unless it exercised its discretion in an "arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10; *People v. Cash* (2002) 28 Cal.4th 703, 727; *People v. Fuiava*, *supra*, 53 Cal.4th at pp. 667–668.) "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. [Citations.]" (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.)

Defendant argues that while the court excluded the second message that he was going to kill "more ppl," the court also should have excluded his first response that he would "kill ppl" because it was highly prejudicial and had very slight probative value. Defendant argues there was no evidence that he even knew about Leyda's party when he wrote the messages the previous day. The messages undermined evidence that the shooting may have been "a spur of the moment occurrence" in response to Leyda telling him to leave. Defendant asserts the message "created a much darker picture" that suggested defendant planned to kill multiple people that night.

Defendant argues the evidence also lacked probative value because the prosecutor failed to introduce evidence to explain Vasquez's identity, or the nature and

circumstances of his relationship with defendant, that would have allowed the jury to determine whether defendant was serious or joking.

The court did not abuse its discretion. It carefully reviewed the entirety of the messages and the photograph of the guns, and properly found the photograph and the last message about killing more people was not relevant to the disputed issues in this case and highly inflammatory. However, defendant's first statement that he was going to kill people was relevant and probative to the issues in this case. While defendant relied on an alibi defense, the jury was instructed on attempted voluntary manslaughter based on heat of passion as a lesser included offense to attempted murder. The evidence was relevant to show defendant's intent since he arrived at the party with a loaded gun tucked into his waistband and appeared eager to use it. Defendant showed the gun to Pa.'s friends in an unfriendly manner, without any apparent provocation, until they left the party, and displayed it to them immediately upon their return and again obtained their departure. Defendant fired at least one shot in the air while he was standing in the front yard based upon the recovery of the expended casing by the planter, and he may have fired another shot in the air as he left in Mendez's car to get the beer pong table.

While the prosecution did not introduce any evidence to the jury to explain Vasquez's identity, defendant's message to Vasquez was no more inflammatory than the witnesses' description of how he pointed the gun directly at Leyda and shot her at point-blank range after she politely asked him to leave the party, and then pointed the gun at the other guests and directly at her 12-year-old brother as he escaped. (See, e.g., *People v. Spector* (2011) 194 Cal.App.4th 1335, 1389.)

III. The Firearm Enhancements

Defendant asserts the matter must be remanded for the court to consider whether it would strike the terms for the firearm enhancements imposed under sections 12022.5 and 12022.53, based on the subsequent enactment of Senate Bill No. 620. (Stats. 2017, ch. 682, § 2 (SB 620).)

The People concede that the sentencing provisions of SB 620 are retroactive since defendant's case is not yet final. However, the People argue remand is not appropriate because the record indicates the court would not have exercised discretion to impose a lesser sentence in this case and striking the enhancements would not be in the interests of justice. We agree.

A. SB 620

At the time of the sentencing hearing in this case, imposition of firearm enhancements under sections 12022.5 and 12022.53 was mandatory and could not be stricken in the interest of justice pursuant to section 1385 or any other provision of law. (*People v. Thomas* (1992) 4 Cal.4th 206, 213–214; *People v. Felix* (2003) 108 Cal.App.4th 994, 999; *People v. Sinclair* (2008) 166 Cal.App.4th 848, 852–853; *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362–1363.)

On October 11, 2017, the Governor signed SB 620, effective January 1, 2018. SB 620 amended sections 12022.5 and 12022.53 to give discretion to the trial court to strike firearm enhancements in the interest of justice. Both these statutes now state:

> "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.5, subd. (c); § 12022.53, subd. (h).)

Defendant and the People agree that SB 620's amendments apply retroactively to cases not yet final on appeal. (*In re Estrada* (1965) 63 Cal.2d 740, 746; *People v. Francis* (1969) 71 Cal.2d 66, 75–76; *People v. Brown* (2012) 54 Cal.4th 314, 323.) They disagree as to whether the matter must be remanded for the court to consider whether to exercise its discretion in this particular case.

The jury returned verdicts on three counts which listed Leyda as the victim: Count 1, attempted murder (§§ 664, 187, subd. (a)), done willfully with premeditation and deliberation (§ 189), while personally inflicting great bodily injury (§ 12022.7,

subd. (a)), accomplished by personal and intentional discharge of a firearm which proximately caused great bodily injury (§ 12022.53, subd. (d)); count 2, assault with a firearm (§ 245, subd. (a)(2)), while using a firearm (§ 12022.5, subd. (a)), and personally inflicting great bodily injury (§ 12022.7, subd. (a)); and count 4, exhibiting a firearm (§ 417, subd. (a)(2)). The jury also returned verdicts on two counts which listed P. as the victim: Count 3, assault with a firearm (§ 245, subd. (a)(2)), while using a firearm (§ 12022.5, subd. (a)), and count 5, exhibiting a firearm (§ 417, subd. (a)(2)).

The trial court sentenced defendant on September 14, 2016. The trial court stated defendant was "an absolute danger to the community … [t]o the community at large." Although, defendant had a "limited record of criminal conduct," his prior performance on juvenile probation was unsatisfactory as he had violated its terms. The court additionally noted the active misdemeanor warrant for defendant's arrest for petty theft. The court commented on the extent of the injury inflicted on the victim by the gunshot ("wounds through and through on both sides … of the neck …") when it stated no unusual circumstances allow for probation.

Remand is necessary when the record shows the trial court proceeds with sentencing on the erroneous assumption it lacks discretion. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)[31] If, however, the record shows the sentencing court "would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*).)

In *McDaniels*, the issue was whether remand for the exercise of discretion imparted by SB 620 was proper. *McDaniels* cited to *People v. Gutierrez* (1996) 48

---

[31] In *Brown* the court found that, contrary to the limited discretion granted by section 1202.4, subdivision (f), the sentencing court mistakenly believed it had no discretion to award less than full victim restitution. It remanded the matter to the sentencing court so that court could exercise that limited discretion.

Cal.App.4th 1894. *Gutierrez* addressed when reconsideration of sentencing was required under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. "*Gutierrez* concluded that '[r]econsideration of sentencing is required under *Romero* where the trial court believed it did not have discretion to strike a three strikes prior conviction, unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegation. [Citation] We see no reason why this same standard would not apply in assessing whether to remand a case for resentencing in light of S.B. 620.' " (*McDaniels, supra,* 22 Cal.App.5th at p. 425; see also *People v. Jones* (2019) 32 Cal.App.5th 267, 272–275 [applying similar standard to decline remand after enactment of Senate Bill No. 1393 regarding § 667, subd. (a)(1) enhancement.)

Here, the trial court's discretionary sentencing choices clearly indicate it would not have exercised its discretion to strike the firearm enhancements if it had, at the time of the sentencing, the discretion to do so.

As to count 3 (P.), the court followed the recommendation of the probation department and imposed the middle term on both the crime (three years) and the firearm enhancement (four years). (§§ 245, subd. (a)(2), 12022.5, subd. (a).) Probation explained the reason for their recommendation on the firearm enhancement: "[S]pecifically, to the victim, [P.], the [d]efendant did not discharge the firearm, thus not justifying the upper …."

The record does not end there, however. The trial court considered the act constituting the section 12022.5, subdivision (a), enhancement on count 2 (Leyda) to be the same act constituting the section 12022.53, subdivision (d) enhancement on count 1 (Leyda). We know this from the fact the trial court stayed the sentences it imposed on count 2 pursuant to section 654. Section 654, subdivision (a), provides "[a]n act … that is punishable in different ways by different provisions of law shall [not] … be punished under more than one provision." Because the trial court considered the two firearm enhancements to be the same act, its exercise of sentencing discretion on the section

12022.5, subdivision (a) enhancement – the imposition of the upper term of 10 years (§ 12022.5, subd. (a)) – defines its position on the 12022.53, subdivision (d) enhancement.

Defendant asserts the matter must be remanded because the court did not realize it had discretion to reduce the firearm enhancement to a "lesser-included, but uncharged enhancement" as stated in *People v. Morrison* (2019) 34 Cal.App.5th 217. (Rehg. petn. at p. 5.) We reject this argument and respectfully disagree with *Morrison* for the reasons set forth by this court in *People v. Tirado* (August 12, 2019; F076836) __ Cal.App.5th ___ [2019 Cal.App. LEXIS 739].

In this case, remand would be an idle act, so we decline to order it.

DISPOSITION

The judgment is affirmed.

_____
POOCHIGIAN, Acting P.J.

I CONCUR:

_____
DETJEN, J.

DE SANTOS, J., Concurring and Dissenting

I concur with the majority opinion on all issues but one. I respectfully dissent as to the issue regarding the firearm enhancements. I would remand the matter to the trial court to exercise its discretion in light of Senate Bill No. 620 (Stats. 2017, ch. 682, § 2). I disagree that the trial court evidenced its intent that it would not exercise its discretion to strike an enhancement if it had known it had the discretion to do so.

The majority cite to *People v. McDaniels* (2018) 22 Cal.App.5th 420 and *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*) for the standard of when reconsideration of sentencing is required. While the sentencing by the trial court in the present case has some similarities to *Gutierrez*, in my view, the cases are distinguishable. In *Gutierrez*, the sentencing court noted that the defendant clearly engaged in a pattern of violent conduct and was a serious danger to society. (*Gutierrez*, at p. 1896.) The sentencing court in *Gutierrez* imposed the aggravated term and imposed an enhancement pursuant to Penal Code[1] section 667, subdivision (a) and two enhancements pursuant to section 667.5, subdivision (b). (*Gutierrez*, at p. 1896.) When determining whether to strike the section 667.5, subdivision (b) enhancements, the court stated " 'there really isn't any good cause to strike it. There are a lot of reasons not to, and this is the kind of individual the law was intended to keep off the street *as long as possible*.' " (*Gutierrez*, at p. 1896, italics added.)

In the present case, even though the trial court stated defendant is "an absolute danger to the community," comments similar to some of those made by the *Gutierrez* court, it did not impose the maximum sentence available. Rather, it chose to impose the middle terms on count 3 for violation of section 245, subdivision (a)(2) and the firearm enhancement pursuant to section 12022.5, subdivision (a). I do not agree with the

---

[1] All further statutory references are to the Penal Code.

majority that remand would be an idle act as the record does not indicate the trial court could not be persuaded to strike the section 12022.5, subdivision (a) enhancement connected to count 3. For those reasons, I respectfully dissent from my colleagues' decision not to remand for the trial court's reconsideration to strike the firearm enhancements.

_____

DeSANTOS, J.